

<b>Wells Fargo Bank, N.A. v Hagg</b>
2015 NY Slip Op 31037(U)
June 8, 2015
Supreme Court, New York County
Docket Number: 850049/11
Judge: Carol E. Huff
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 32

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WELLS FARGO BANK, N.A., : Index No. 850049/11  
3476 Stateview Boulevard :  
Ft. Mill, SC 29715 :

Plaintiff, :

- against - :

LESLIE S. HAGG; ABLE RIGGING CONTRACTORS :  
AKA ABLE RIGGING CIONTRACTORS; BOARD :  
OF MANAGERS OF GATEWAY CONDOMINIUM; :  
NEW YORK CITY ENVIRONMENTAL CONTROL :  
BOARD; NEW YORK CITY PARKING VIOLATIONS :  
BUREAU; NEW YORK CITY TRANSIT :  
ADJUDICATION BUREAU; PEOPLE OF THE STATE :  
OF NEW YORK; WELLS FARGO BANK, NA; :

JOHN DOE (Said name being fictitious, it being the :  
intention of Plaintiff to designate any and all occupants :  
of premises being foreclosed herein, and any parties, :  
corporations or entities, if any, having or claiming an :  
interest or lien upon the mortgaged premises.) :

Defendants. :

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CAROL E. HUFF, J.:

In this mortgage foreclosure action with respect to property located at 2098 Eighth Avenue, New York, New York, plaintiff moves for summary judgment, and orders appointing a referee to compute and allowing the caption to be amended. Defendant Leslie S. Hagg, the only defendant who has answered the complaint, cross moves for summary judgment and sanctions.

Plaintiff has demonstrated prima facie entitlement to a judgment of foreclosure by submitting proof of the mortgage and default (Barcov Holding Corp. v Bexin Realty Corp., 16

AD3d 282 [1st Dept 2005]). A defendant must raise a viable defense or triable issue of material fact in order to defeat the motion. Bank of India v Sanghvi, 224 AD2d 347 (1<sup>st</sup> Dept 1996).

Hagg contends that she never received notice of her default prior to the commencement of this action. However, plaintiff's moving papers contain a copy of the notice (Ex. H) and a copy of the affidavit of Kenyara C. Lockett, plaintiff's vice president for loan documentation, dated September 4, 2013, attesting to the mailing of the notice (Ex. G). An affidavit "based upon documentary evidence which is legally sufficient . . . is sufficient to support a motion for summary judgment" even if the bank official did not have personal knowledge of the facts. Marine Midland Bank, N.A. v Embassy East, Inc., 160 AD2d 420, 421 (1<sup>st</sup> Dept 1990). Service by mail is complete upon mailing, and the recipient's mere statement that she did not receive it is not sufficient to raise a triable issue of fact. See Spangenberg v Chaloupka, 229 AD2d 482 (2d Dept 1996).

Hagg further contends that plaintiff failed to negotiate in good faith in compliance with CPLR 3408(f) ("Both the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible."). The negotiations concerned Hagg's application for a Federal Home Affordable Modification Program ("HAMP") loan modification. She details numerous instances of plaintiff's delays and requests for more and duplicative information, but the crux of the issue is plaintiff's denial of her HAMP application purportedly based on its decision not to include her non-borrower husband's offer to make partial payments of the monthly bill. Hagg argues that this was without justification, and that with his contribution she would easily have qualified for the modification.

The Freddie Mac HAMP guidelines, § 65.18(b) (Borrower income documentation),

provides that servicers should include non-borrower household income if, among other things, “The Servicer verifies that the non-Borrower occupies the subject property as a Primary Residence based on a review of a credit report or other documentation (e.g., utility bills, paystubs, benefits statements).” Edward Rugino January 23, 2015 Aff. in Opposition, Ex. A. Plaintiff states that there was no evidence of her husband’s residence at the subject home, and that evidence pointed to his residence being in New Jersey. In any case, plaintiff states that even if the husband’s offer of \$600 per month was added to Hagg’s income, the principal balance was reduced, the interest rate was reduced, and the loan term was extended, Hagg’s monthly payment would still constitute 47.967% of her income. The HAMP threshold is 31%.

Hagg has failed to produce evidence sufficient to demonstrate that plaintiff’s application of the HAMP guidelines in determining her qualifications for a loan modification was incorrect. Her conclusion that, with her husband’s offer included in the analysis, she would “easily” have qualified for a loan modification, is based on her attorney’s undocumented calculations. Consequently, it has not been shown that plaintiff failed to engage in good faith negotiations with Hagg.

Hagg’s answer contains only a general denial, and her remaining affirmative defenses are unsupported by evidence.

Accordingly, it is

ORDERED that the cross motion is denied; and it is further

ORDERED that the plaintiff's motion is granted, and plaintiff is directed to settle order.

Dated:

**JUN 08 2015**

  
**CAROL E. HUFF**  
J.S.C.